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Industrial Marketing Through Leasing Devices: A Survey of Antitrust Problems

NOTES

INDUSTRIAL MARKETING THROUGH LEASING DEVICES: A SURVEY OF ANTITRUST PROBLEMS

The rapidly increasing use of leasing as a marketing device in the post war years and the coincident increase in the number of anitrust proceedings which have resulted in decrees restricting this method of distribution have raised an important problem as to striking a balance between what appears to be desirable advancement in the marketing field and the interests of the economy as a whole as these interests are conceived in the antitrust laws. The most notable and apparently most permanent increase in leasing has appeared in industrial and production equipment markets. Undoubtedly, it is the nature of the industries in these markets, which are generally more or less oligopolistic, which has been the background for most of the antitrust activity; but the vigor with which sanctions have been applied against company leasing policies warrants examination of both the propriety and utility of such restrictions. This examination will require the formulation of generalizations regarding restrictions of leasing, which must be made with perhaps insufficient regard for the individual case; a survey of reasons for the increased use of leasing as a marketing device in the industrial equipment and production fields; and finally, a determination as to the areas of actual and potential conflict as well as competitive consequences of this type of remedy.

Both lease provisions and business policies relating to a system of leasing have been subjected to antitrust proscription through a variety of channels.[1] Presently they are subject to attack under section three of the

1. The earliest cases stemmed from the statutory patent monopoly and the use of tying agreements. Heaton-Pennisular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288 (6th Cir. 1896) held that a sale of a patented shoe button-fastening machine conditioned upon the exclusive use of the vendor's unpatented shoe buttons so as to give the latter a monopoly on the manufacture and sale of buttons was not in restraint of trade or against public policy, but was a protected exercise of the patent monopoly. This misconstruction of the patent law was corrected, without reference to the Sherman Act or to the Clayton Act, section three of which had been prompted by the Heaton-Penninsular case, in Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917). The patentee in that case had licensed a manufacturer to produce and sell motion picture machines imbodying his invention upon a covenant that the vendor's purchasers or the latters' lessees should use only certain films, which were controlled by the patentee, upon such terms as the patentee should impose. The Court broadly held: "What ever the right of the owner may be to control by restriction the materials to be used in operating the machine, it must be a right derived through the general law from

Clayton Act,[2] relating to tying agreements, as contracts in restraint of trade under section one of the Sherman Act[3] and as a method of monopolizing or attempting to monopolize under section two of the Sherman Act.[4]

Leasing agreements which have been successfully attacked under section three of the Clayton Act fall into three groups—the formal written tying clauses, strict specifications for supplies and materials used with a leased machine and informal tying policies. The first group includes a wide variety of provisions designed to: (a) require that other machinery be purchased or leased from the lessor or that the lessee not use machinery provided by the lessor's competitors;[5] (b) extract a royalty payment for the use of machinery or material not obtained from the lessor;[6] (c) require the lessee to purchase supplies or materials, used in or in

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the ownership of the property in the machine, and it cannot be derived from or protected by the patent law, which allows a grant only of the right to an exclusive use of the new and useful discovery which has been made." *Id.* at 419. Thus the question of legality of tying agreements was at the same time divorced from the patent law and left for determination solely under the general law including the Clayton Act.

2. "That it shall be unlawful for any person engaged in commerce, in the course of such commerce to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition may be to substantially lessen competition in any line of commerce." 15 U.S.C.A. § 14.

3. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . . ." 15 U.S.C.A. § 1.

4. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . . " 15 U.S.C.A. § 2.

5. "Prohibitive clause" providing that the particular machine leased should not be used in the preparation or manufacture of shoes upon which any work is done with any machine not held under a lease from the lessor. United Shoe Machinery Corp. v. United States, 258 U.S. 451 (1922). "Exclusive use" clause requiring the lessee of particular machinery to use exclusively machines of the lessor to perform the same kind of work as that performed by the machines leased. *Id.* "Additional machines" clause providing that if lessee has more work than can be performed by the machine leased, he must lease additional machinery from the lessor to perform the work. *Id.* Clause providing that lessee shall only use machinery leased on shoes which have had certain other operations performed upon them by the lessor's machines. *Id.* Grant of lease of peach pitters upon condition that other machinery be purchased or leased. United States v. Food Machinery & Chemical Corporation, 1954 Trade Cas. ¶ 67,829 (N.D. Cal. 1954). Lessee required not to use any vending machines other than those of the lessor for the duration of the term and for five years thereafter. Automatic Canteen Co. of America v. FTC, 194 F.2d 433 (7th Cir. 1952). Requirement that lessee not sell any products which were not distributed through the leased vending machines. *Id.*

6. Leases of graining plates imposed penalty royalty on lessees using graining materials obtained from lessor's competitors. Oxford Varnish Corp. v. Ault & Wiborg Corp., 83 F.2d 764 (6th Cir. 1936). Clause requiring lessee to pay a royalty on shoes

conjunction with the leased equipment, which may be the primary product or a side line of the lessor;[7] (d) require the lessee to purchase all repair and replacement parts for the leased machinery or equipment from the lessor. Specifications for materials and equipment to be used in connection with leased machinery are unobjectionable when reasonably calculated to make the machinery more productive, efficient or longer lived[8] but it is not clear that a lessor may require that the lessee use materials or equipment equal in quality to that which the lessor can furnish where such specifications are not shown to be necessary to the proper functioning of the leased machine.[9] Prevailing practice in the can industry prior to 1949 best illustrates the informal tying system which section three of the Clayton Act condemns. Lessors as a matter of business policy leased can closing machines only to lessees who agreed to purchase cans under a requirements contract the term of which was identical to the machinery lease. This practice led to a decree against the major can companies in which the section three remedy included prohibition of any lease of machines upon a condition or understanding that the lessee purchase only the lessor's cans, or that he purchase a specified quota or amount of cans, prohibition of the lessor's conditioning the availability of machinery or renewal of leases upon such grounds, and prohibition against the lessor's altering machinery or cans so that the machinery or cans of other manufacturers cannot be used with the machinery or cans of the lessor, unless for reasons of progress or efficiency.[10]

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operated on by machines procured from lessor's competitors. United Shoe Machinery Corp. v. United States, *supra,* note 5. Clause providing lower royalty for lessees who agree not to use certain machinery on shoes lasted on machines other than those leased from the lessor. *Id.*

7. Requirement that lessee purchase shot buttons used in conjunction with leased shoe machinery exclusively from the lessor. United Shoe Machinery Corp. v. United States, *supra,* note 5. Lessee of wire strapping packaging machines required to purchase all wire strapping used in the machines from the lessor. Signode Steel Strapping Co. v. FTC, 132 F.2d 48 (4th Cir. 1942). Lessee of riveting machines required to purchase all rivets used in them from the lessor. Judson L. Thompson Mfg. Co. v. FTC, 150 F.2d 952 (1st Cir. 1945). Punching machines, sorters, and tabulators leased upon condition that the lessee use lessor's punch cards exclusively. International Business Machines Corp. v. United States, 298 U.S. 131 (1936). Provision in leases of machines for industrial utilization of salt requiring that only salt purchased from the lessor be used in them. International Salt Co. v. United States, 332 U.S. 392 (1947). Requirement in leases of vending machines that lessee not distribute through the machines any products not purchased from the lessor. Automatic Canteen Co. of America v. FTC, *supra,* note 5. Requirement in leases of graining plates that lessees purchase graining materials used with them exclusively from lessor. Oxford Varnish Corp. v. Ault & Wiborg Corp., *supra,* note 6.

8. Stanley Co. of America v. American Telephone & Tel. Co., 4 F. Supp. 80 (D. Del. 1933).

9. See International Salt Co. v. United States, *supra,* note 7.

10. See United States v. American Can Co., 87 F. Supp. 18 (N.D. Cal. 1949), final order, 1950 Trade Cas. ¶ 62,679. See also United States v. American Linen Supply Co., 1956 Trade Cas. ¶ 68,542 (N.D. Ill. 1956).

Two kinds of arguments have been advanced in cases where leasing practices fell within one of the described situations. The first has been aimed at limiting the meaning or applicability of the terms of section three by means of justification in sound business policy or legal theory, with the ultimate purpose of creating judicial exceptions to the proscribed activity. The second has been intended to define the concept of tendency to substantially lessen competition so as to make tying practices unobjectionable in certain industries or when practiced by certain individuals.

Arguments of the first kind have been generally unsuccessful. The contention that a tying clause is permissible when the lessor has patents on both the leased machinery and the tied product which give it a monopoly on both has been refuted.[11] It has been argued without avail that the purpose of the tying agreement was to maintain the lessor's good will where the use of inferior goods or supplies with the leased machinery might interfere with the successful performance of the machine.[12] The position has been taken by some lessors who rent inexpensive machinery, which is easily purchasable on the market at nominal rates, with tying provisions that only the primary product of the lessor be used in conjunction with them that they were merely furnishing a service to their customers, *i.e.*, using the rentals as a sales device. With one exception, it has been rejected on the ground that the practical effect was the same as with any other tying agreement.[13] Substantiation of claims that the leased machinery operated more efficiently when used with the lessor's product will not alone justify a tying agreement unless it is further shown that competitors are not capable of producing a satisfactory product.[14] It has been argued unsuccessfully that where the lease contract provides for a nominal rental and an exclusive territory for the lessee, it destroys mutuality and thereby deprives lessees of valuable contract rights when they have not been made a party to the proceeding to enjoin enforcement of clauses requiring the lessees to use the lessor's machines exclusively and to purchase all merchandise used with the leased machinery from the lessor.[15] Finally, the contention that the lessor exer-

11. Stanley Co. of America v. American Telephone & Tel. Co., *supra*, note 8.

12. International Business Machines Corp. v. United States, 298 U.S. 131 (1936). See Stanley Co. of America v. American Telephone & Tel. Co., 4 F. Supp. 80 (D. Del. 1933) where the court struck down strict specifications for sound records used with its reproducing machinery but admitted that these requirements might have been reasonable in the early years of the industry to build the patentee's good will.

13. Judson L. Thompson Mfg. Co. v. FTC, 150 F.2d 952 (1st Cir. 1945); Signode Steel Strapping Co. v. FTC, 132 F.2d 48 (4th Cir. 1942). For the exception see FTC v. Sinclair Refining Co., 261 U.S. 463 (1923).

14. International Salt Co. v. United States, 332 U.S. 392 (1947); Judson L. Thompson Mfg. Co. v. FTC, *supra*, note 13.

15. 78 F. Supp. 850, 854 (S.D. Cal. 1948).

cised such strict control and complete domination over its lessees that they were in fact employees and that the rule of *Standard Oil of California and Standard Stations, Inc. v. United States*[16] to the effect that restrictive agreements with wholly owned distributing corporations are not prohibited should be applied has been rejected with the statement that the lessor chose the lease form and must accept its consequences.[17]

On the other hand, it has been successfully argued that a provision requiring the lessee to obtain from the lessor exclusively at its regular prices all duplicate parts, mechanisms and repairs is reasonable where all parts of the leased machines are very delicate and, unless perfectly adjusted, will seriously impair proper operation and thus is not violative of section three.[18] Also, it may be the law that where the leased equipment is used in connection with the sale by the lessee of the lessor's product, a clause requiring that only the lessor's product be sold in connection with the lessor's equipment is not within the proscription of section three where the contrary practice might result in a fraud upon the public.[19]

As to interpretation of the standard of tendency to substantially lessen competition, it is clear that the fact that the lessor offers its customers an alternative form of lease which does not contain objectionable restrictions is irrelevant.[20] Likewise, provisions that if any competitor of the lessor offers the tied product to the lessee at a lower price than the lessor charged, the lessee was free to purchase unless the lessor met the price, or that the lessee was entitled to any general reduction in the price of the tied product will not validate tying agreements which otherwise fall within the section three standard.[21] Beyond this, the section is not interpreted as requiring proof that competition has actually diminished;[22] but neither does it operate where there is a "mere possibility" of a substantial lessening of competition;[23] there must be a probability that competition will be substantially lessened.[24] A substantial lessening of competition is interpreted to mean the foreclosure of competition in a sub-

16. Automatic Canteen Co. v. FTC, 194 F.2d 433 (7th Cir. 1952).
17. United States v. Richfield Oil Corp., 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd per curiam*, 343 U.S. 922 (1952).
18. United Shoe Machinery Corp. v. United States, 258 U.S. 451 (1922).
19. See Signode Steel Strapping Co. v. FTC, 132 F.2d 48 (4th Cir. 1942) where the court comments upon FTC v. Sinclair Refining Co., 261 U.S. 463 (1923).
20. United Shoe Machinery Corp. v. United States, *supra*, note 18.
21. International Salt Co. v. United States, 332 U.S. 392 (1947).
22. Standard Oil of California and Standard Stations, Inc. v. United States, 337 U.S. 293 (1949).
23. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922).
24. *Ibid.*

stantial share of the line of commerce affected.[25] Domination of the market for the tying product is generally considered sufficient in itself to support an inference of such foreclosure.[26] Proof that a substantial volume of commerce in the tied product is restrained may also amount to such a foreclosure.[27] It has also been established that whenever a lessor seeks by means of a tying agreement to extend a patent monopoly over the leased product to a monopoly of the market in unpatented supplies or materials and succeeds in doing this, he has substantially lessened competition in the latter line of commerce on the theory that the patent on the tying product gives a hold upon that market.[28]

Various lease provisions have been condemned as contracts in restraint of trade under section one of the Sherman Act.[29] Also certain policies relating to the conduct of leasing systems have been condemned as furthering combinations or conspiracies in restraint of trade under this section.[30] Under section two, lease provisions and policies relating to a leasing system have likewise been condemned—as a principal instrument of monopolization, and one which is relatively easy to cope with by judicial remedy.[31] Frequently a leasing system is vigorously attacked on the basis of both sections without precise application of the elements of the act to the various remedial measures.[32]

Once a violation of section one or section two can be made out in terms of the existence of a restraint of trade or monopolization and a leasing system is found to be a significant factor in accomplishing the illegality, the lessor will invariably be required to embark upon a policy of offering to sell the product, as well as lease it, to all comers and upon

25. Standard Oil of California and Standard Stations, Inc. v. United States, 337 U.S. 293 (1949); International Salt Co. v. United States, 332 U.S. 392 (1947) (foreclosure of competitors from any substantial market unreasonable per se).

26. International Business Machines Corp. v. United States, 298 U.S. 131 (1936); United Shoe Machinery Corp. v. United States, 258 U.S. 451 (1922); United States v. American Can Co., 87 F. Supp. 18 (N.D. Cal. 1949). See also Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953).

27. Oxford Varnish Corp. v. Ault & Wiborg Corp., 83 F.2d 764 (6th Cir. 1936). See also Signode Steel Strapping Co. v. FTC, 132 F.2d 48 (4th Cir. 1942); Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953); Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958) (dissenting opinion).

28. Oxford Varnish Corp. v. Ault & Wiborg Corp., *supra*, note 27.

29. *E.g.*, United States v. Crown-Zellarbach Corp., 1956 Trade Cas. ¶ 68,544 (N.D. Ill. 1956) (tying agreement).

30. *E.g.*, United States v. American Linen Supply Co., 1956 Trade Cas. ¶ 68,542 (N.D. Ill. 1956) (required to offer to sell the product).

31. *E.g.*, United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953); United States v. International Business Machines Corp., 1956 Trade Cas. ¶ 68,245 (S.D.N.Y. 1956).

32. *E.g.*, United States v. American Can Co., 87 F. Supp. 18 (N.D. Cal. 1949).

substantially the same terms, if he has not previously done so.[33] His lessees may automatically be given an option to purchase machinery already held under lease at terms at least as favorable or advantageous economically as the lease terms;[34] and all future leases may be required to include an option to purchase as well.[35] Characteristically there is a requirement that the lessor keep adequate supplies of repair parts on hand for purchasers of its machinery as well as for lessees, that it not discriminate against purchasers in providing maintenance and other services (including information) and that it charge lessees separately for repairs and maintenance and provide these to purchasers at substantially the same rates.[36] In a section two or monopolization case the lessor may be enjoined from acquiring any used machines owned by others except for experimental purposes, or perhaps as trade-ins or credit against sums owed, and then only in limited amounts; and may be required to rid itself of all used machinery on hand.[37]

Major alterations of lease provisions also frequently result when a case is made out under both sections one and two of the Sherman Act. The period of outstanding leases has typically been severely reduced, and the maximum period of future leases restricted to one year, or somewhat longer if a provision for cancellation on short notice after one year is included. Further the lessee has been provided with a one year renewal or successive one year renewals upon expiration of any lease, with pro-

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33. United States v. American Linen Supply Co., 1956 Trade Cas. ¶ 68,542 (N.D. Ill. 1956) (consent decree under § 1 Sherman Act) (must offer to sell after one year from date of decree); United States v. International Business Machines Corp., 1956 Trade Cas. ¶ 68,245 (S.D.N.Y. 1956); United States v. Food Machinery & Chemical Corp., 1956 Trade Cas. ¶ 67,829 (N.D. Cal. 1954) (required to offer to sell any existing type peach pitters available); United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953); United States v. American Can Co., 1950-1951 Trade Cas. ¶ 62,679 (N.D. Cal. 1950) (final judgment) (requirement of offer to sell expires after ten years). In the *I.B.M. case, supra,* the court additionally required that defendant must afford its sales representatives compensation for sales of machines equivalent to that for leases of machines.

34. United States v. International Business Machines Corp., 1956 Trade Cas. ¶ 68,245 (S.D.N.Y. 1956); United States v. American Linen Supply Co., 1956 Trade Cas. ¶ 68,542 (N.D. Cal. 1956) (consent decree under § 1 Sherman Act); United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953).

35. United States v. American Can Co., 1950-1951 Trade Cas. ¶ 62,679 (N.D. Cal. 1950) (required to sell to any lessee upon application for 10 year period).

36. United States v. International Business Machines Corp., 1956 Trade Cas. ¶ 68,245 (S.D.N.Y. 1956); United States v. Food Machinery & Chemical Corp., 1954 Trade Cas. ¶ 67,829 (N.D. Cal. 1954); United States v. Scott & Williams, Inc., 1954 Trade Cas. ¶ 67,748 (S.D.N.Y. 1954); United States v. Wallace & Tiernan Co., Inc., (D.R.I. 1954); United States v. American Can Co., 1950-1951 Trade Cas. ¶ 62,679 (N.D. Cal. 1950).

37. United States v. International Business Machines Corp., *supra,* note 36; United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953).

vision for cancellation on short notice;[38] the only exception to these provisions being that new types and models of machinery are granted a longer initial leasing period, usually from three to five years.[39] The lessor is not permitted to provide machinery without cost or below cost, *i.e.*, rental rates must be compensatory;[40] further, machinery may not be leased at discriminatory prices for the purpose of destroying competitors or competition.[41] The lessor cannot by the terms of the lease prohibit or control experimentation, alteration, or use of attachments or auxiliary equipment with leased machinery except to assure that the machinery is left in good order at the termination of the lease.[42] Tying clauses of the kind dealt with under section three of the Clayton Act have also been eliminated under sections one and two of the Sherman Act. Thus, the lessor may not provide machinery on the condition that the lessee purchase or use other machinery furnished by the lessor or anyone else,[43] or that the lessee not purchase or use other machinery not furnished by the lessor or anyone else,[44] or that he purchase any materials or supplies from the lessor or anyone else.[45] Finally the lessor will not be permitted to incorporate substantial return charges in machinery leases,[46] or require disclosure of the use to which the machine will be put by the lessee,[47] and will be required to separate rental charges from servicing charges.[48]

As regards the requirements of restraint of trade under section one and monopolization under section two it is sufficient for these purposes

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38. United States v. International Cigar Machinery Co., 1956 Trade Cas. ¶ 68,426 (S.D.N.Y. 1956); United States v. International Business Machines Corp., *supra,* note 36; United States v. Food Machinery & Chemical Corp., 1954 Trade Cas. ¶ 67,829 (N.D. Cal. 1954); United States v. United Shoe Machinery Corp., *supra,* note 37. But see United States v. American Can Co., 1950-1951 Trade Cas. ¶ 62,679 (N.D. Cal. 1950) where no limitation was placed on the lease period but lessees were given automatic options to renew for one year and the end of term could not occur within three months of the end of the term of a requirements contract, upon which a time limitation was placed.

39. United States v. International Cigar Machinery Co., *supra,* note 38; United States v. Food Machinery & Chemical Corp., *supra,* note 38.

40. United States v. Wallace & Tiernan Co., Inc., 1954 Trade Cas. ¶ 67,828 (D.R.I. 1954); United States v. American Can Co., *supra,* note 38.

41. United States v. Scott & Williams, Inc., 1954 Trade Cas. ¶ 67,748 (S.D.N.Y. 1954).

42. United States v. International Cigar Machinery Co., 1956 Trade Cas. ¶ 68,426 (S.D.N.Y. 1956); United States v. International Business Machines Corp., 1956 Trade Cas. ¶ 68,245 (S.D.N.Y. 1956).

43. United States v. Scott & Williams, Inc., 1954 Trade Cas. ¶ 67,748 (S.D.N.Y. 1954); United States v. Wallace & Tiernan Co., Inc., 1954 Trade Cas. ¶ 67,828 (D.R.I. 1954).

44. United States v. Wallace & Tiernan Co., Inc., *supra,* note 43.

45. See cases cited, *supra,* note 43.

46. United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953).

47. United States v. International Business Machines Corp., 1956 Trade Cas. ¶ 68,426 (S.D.N.Y. 1956).

48. *Ibid.*

to say that under *United States v. Hartford-Empire Co.*[49] and *United States v. United Shoe Machinery Corp.*,[50] if certain features of a leasing system are thought to be principal factors creating the situation which exists in violation of sections one and two, these key features will be eliminated.

The reasoning underlying the increasing use of the lease as a marketing device in industrial situations where it has not been traditional is for the most part persuasive. It may be summarized as follows.[51] Producers in many industries believe that it facilitates the distribution of expensive productive equipment such as machine tools, *i.e.*, customers are beginning to demand a leasing plan for the purposes of freeing their own working capital, taxation, experimentation with new machinery, and other real or supposed advantages.[52] The complex nature of his product, may impel the seller to take full responsibility for its service and maintenance in order to protect his brand name. When leasing becomes a major marketing tool of a firm, or an entire industry, the stability and predictability which is injected into the market can promote efficiency and make profits greater—distribution can be kept up even in down phases of the business cycle because the buyer is not required to commit himself to large scale investments. Thus, long range planning can be accurate and, in the short run, production of the leased product can be kept level. It is contended that as an ultimate result, the existence of excess capacity in an industry can be almost entirely eliminated.[53]

Credit risks are reduced in that the legal difficulties involved in the repossession of goods purchased outright, when the buyer defaults, are minimized; the seller can more readily afford to risk distribution to buyers whose credit strength would not meet minimum standards for purchase; and, finally, the seller avoids the loss of equipment as legal liability to other creditors of the buyer which might otherwise occur in some states—especially where the equipment must be bolted to the floor or in some other way becomes attached to the realty. It is also thought that the close associations between buyer and seller developed in a leasing situation may open the way to more ready distribution of other products in the line, which often are sold outright. Since supplies of particular

49. 46 F. Supp. 541 (N.D. Ohio 1942).
50. 110 F. Supp. 295 (D. Mass. 1953).
51. See generally, Griesinger, *Pros and Cons of Leasing Equipment*, HARV. BUS. REV.; March 1955, p. 75.
52. See note 54, *infra*.
53. The past earnings records of International Business Machines Corp. and United Shoe Machinery Corp. tend to support this conclusion but of course the existence of high and level earnings, efficiency and lack of excess capacity might be attributable to other factors in those particular industries.

specifications may be essential in many instances for the proper functioning of the leased product, the seller is also in an especially good position to peddle his line of supplies to the lessee. Finally, leasing has legitimate advantages in that the regular return of used equipment provides sales leads, aids in research and development of better products and allows the seller, by reconditioning and selling where economical, to reach a low price market in which he might not otherwise be able to compete.

From the buyers' standpoint, the desire to obtain equipment without depleting working capital is probably the most important motive behind a leasing agreement.[54] Another important consideration is that leasing industrial equipment may help the manufacturer to avert losses resulting from the rapid obsolescence to which machine tools are subject[55] and enable him to maintain the most modern plant facilities available if the terms of the lease are sufficiently flexible to permit substitution by the lessee.[56] It is also felt that tax savings may be forthcoming since expenditures for leased facilities are fully deductible whereas depreciation chargeable may be insufficient, particularly when a buyer will have only a limited period of use of a machine and will have to dispose of it before it has been fully depreciated.[57] Also cited as advantages, have been that modern equipment is more readily available for a venture containing an element of gambling which would not be undertaken if the equipment had to be purchased and that the buyer is relieved of the burden of servicing equipment which he frequently cannot obtain in the quality that the seller can provide.[58] It should be added that once a seller, whether a producer or not, makes a decision to lease his product, he may have a strong incentive to require that he be permitted to service the leased item in order to make routine inspection and prompt repairs and thus get the maximum useful life from it.[59]

From these summarizations of antitrust restriction of leasing practices and the reasons for use of leasing in industrial marketing, it is apparent that unless extreme care is used in framing antitrust restrictions,

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54. See statement by D. Power Boothe, Jr., president of U.S. Leasing Corp., *Equipment Leasing: What's Behind it?,* BUSINESS WEEK, Sept. 23, 1954, p. 41.

55. Today's machine tools are almost twice as productive as comparable ones produced in 1940. Goodman, *Purchase or Lease?* PURCHASING, July 1956, pp. 122-23.

56. Such flexibility will obtain if the lease is for a relatively short term, can be easily avoided or provides for substitution of newly developed machinery. See Goodman, *supra,* note 55. See also White, *Economics of Equipment Leasing: Types of Leasing Arrangements and Pros and Cons,* 25 CONTROLLER 332.

57. *Equipment Leasing: What's Behind It?,* BUSINESS WEEK, Sept. 23, 1954, p. 41.

58. White, *Economics of Equipment Leasing: Types of Leasing Arrangements and Pros and Cons,* 25 CONTROLLER 332.

59. An example is the leasing of tires by manufacturers to bus lines. Regular inspection and repair has considerably increased tire life.

legitimate use of the device may be hindered. In terms of the rationale behind a leasing system conflicts may arise in at least four areas.[60] First, the advantage of lower initial and yearly costs to the lessee which has been influential in the development of leasing systems tends to be offset by antitrust restrictions which permit a lease to extend only for short terms without return charges.[61] Such restrictions may lead to increased lease charges since the entire risk of obsolescence is placed upon the lessor, and more particularly are likely to lead to abnormally high but declining charges, which is detrimental from the standpoint of new entrants. It should be noted, however, that since one of the reasons given for preference of the system is the protection from obsolescence,[62] presumably many lessees are willing to pay higher rentals for the benefits of a short term lease. Also, the provision of a recent decree[63] that the lessor may not require the lessee to permit him to make regular inspection and repairs may tend to increase rentals since the lessor cannot be assured of getting maximum life from his equipment. Finally, the requirement that the lessor must offer to sell upon terms economically equivalent to those at which he leases is alleged to have a tendency to keep rental prices at a higher level than they would otherwise be, at least in the shoe machinery industry;[64] even though such a requirement is not generally interpreted to mean that the equivalency must be such that one half of the firm's customers are buyers.[65]

The second advantage of leasing which may be thwarted by insensitive antitrust restriction is that of stabilization of production and income. It is apparent that this advantage is derived only in proportion to the extent of the firm's distribution which is accomplished through leasing. It seems equally apparent that a requirement that the lessor offer to sell upon terms equivalent to those at which leases are concluded is a threat to any stabilization which might be achieved through exclusive or even extensive leasing. The severe reduction of the duration of leases and prohibition of return charges may also adversely affect the firm's attempt at income and production stabilization although this is less clear

60. As far as Clayton Act violations are concerned it is difficult to perceive that any legitimate private or public interest is injured by rigorous enforcement. The typical tying provision is calculated to exploit the firm's superior competitive position in one line of commerce by unnaturally extending it into another. The firm gains nothing but undeserved profits and the public loses by an economically unjustified foreclosure of the market in the latter line of commerce.

61. See cases cited note 38, *supra*.

62. See note 56, *supra*.

63. United States v. International Business Machines Corp., 1956 Trade Cas. ¶ 68,426 (S.D.N.Y. 1956).

64. 2 WHITNEY, ANTITRUST POLICIES 132.

65. *Id.* at 133.

since by charging high but declining rentals and regular introduction of returned equipment into a second-hand market the firm may be able to offset the need for long terms and return charges. Of course a second-hand market will be competitive with the lessor's new product market and will affect the profitability of leasing but there should be no effect upon the stability of the individual firm's operations in so far as it derives from leases themselves, *i.e.*, their duration and the willingness of buyers to accept them at times when they would be unwilling to incur the risk of outright purchase.

Thirdly, the advantage of a leasing system that the manufacturer-lessor is able to keep in touch with the user of the product, to know his problems, and to carry on the most effective research and development program, which has been strikingly pointed out in a few cases,[65] could be affected or eliminated by the requirements that the lessor offer to sell his product or that he allow maintenance and repairs to be obtained from other sources. It should be noted that no decree has ever required a defendant to refrain from leasing or to sell at better terms than those at which he leases or to refrain from offering maintenance and repairs although such restrictions have been contended for.[66] Thus, it seems evident that so long as restrictions do not prevent a manufacturer from leasing and providing maintenance and repairs to a representative section of his customers, he will be able to gain the same information and understanding from this group as he could from his entire market. As far as the advantage of "close associations" with the customer which lead the way to other dealings is concerned, it is doubtful that such an advantage deserves protection in the oligopolistic types of markets in which leasing restrictions have generally occurred. Thus, it must be concluded that advantages which derive from the lessor's ability to "keep in touch" are not impinged by current types of restrictions.

The fourth advantage of leasing relates to the situation where the complex nature of the product makes it desirable that the lessor take full responsibility for its service and maintenance. This advantage may be annihilated by the requirement that the lessor not demand that he be allowed to service the leased product. This requirement is harsh both in this regard and from the standpoint of increased costs mentioned above and should only be invoked in the most serious cases of monopolization.

It is arguable that any antitrust restriction which makes inroads upon marketing devices and policies which are otherwise legitimate and founded upon sound analysis of business conditions is unwarranted; and

66. See United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953).

therefore, that only those distribution methods which in themselves constitute Clayton Act violations or contracts in restraint of trade should be proscribed under the antitrust laws. For this position, it may be further argued that to impose restrictions upon a leasing system as a remedial measure for Sherman Act problems stemming from sources other than the system itself is to invoke a remedy whose effectiveness is uncertain at best and that such problems are properly handled by divestiture, dissolution or public regulation.

This argument has force, but, unfortunately the problem of fashioning suitable remedies in non-competitive industrial situations is not an easy one. Neither the government and courts nor the public are yet persuaded that drastic remedies are called for in these situations; further, this survey shows little evidence that business has been unfairly or arbitrarily deprived of the advantages of the leasing device in those cases where it has been restricted as a part of the overall remedial scheme for Sherman Act violations. Thus, until better methods of establishing competitive industrial conditions are devised it will be necessary for those who fashion decrees to retain an acute awareness of the delicate balance which must be achieved if industrial marketers and their lessees are to obtain the economic advantages of leasing.